

MESA PETROLEUM CO.

IBLA 86-1499

Decided February 14, 1989

Appeal from a decision of the Director, Minerals Management Service, disallowing credit adjustments on royalty remittances and rejecting refund request. MMS-85-0048-OCS and MMS-85-0050-OCS.

Affirmed in part, reversed in part, and remanded.

1. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made.

2. Outer Continental Shelf Lands Act: Refunds

MMS may not deny a request for refund of royalties from a holder of one of several working interests in several leases that remit royalties on their own behalf on the grounds that the holder has not made a showing that the lease accounts as a whole were overpaid.

3. Regulations: Force and Effect As Law

The MMS Payor's Handbook lacks the force and effect of law.

APPEARANCES: Jerry E. Rothrock, Esq., Michelle L. Gilbert, Esq., and Mary M. Munson, Esq., Washington, D.C., for Mesa Petroleum Company; Cass C. Butler, Esq., Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Factual and Procedural Background

By letter of January 31, 1984, the Manager of the Tulsa Regional Compliance Office, Minerals Management Service (MMS), advised Mesa Petroleum

Company (Mesa) that an MMS review of Mesa's adjustments of Outer Continental Shelf (OCS) royalty remittances had been completed. MMS found Mesa had reduced its OCS royalties by \$1,446,632.05 by making "net downward adjustments" on its monthly MMS-2014 reports from February through August 1983. The Regional Manager stated that the adjustments constituted refunds of OCS royalties that were not authorized under section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1339 (1982), 1/ because Mesa had "not submitted the required requests for repayment." The Manager's letter stated that Mesa "must make restitution of \$1,446,632.05 for unauthorized credit adjustments" and was accompanied by schedules listing the royalty amounts due by individual leases and lease months. The credit adjustments taken by Mesa were for royalties paid on 15 leases in May, July, and August 1978; October, November, and December 1979; July 1981; February through December 1982, and January through April 1983. Mesa owns a working interest in each of the leases.

By letter dated March 6, 1984, MMS allowed Mesa to tender a letter of credit in lieu of the payment requested in MMS' January 31, 1984, demand letter. MMS also advised Mesa to immediately file a formal request for refund of the amount Mesa deemed it overpaid on the OCS leases listed in MMS' demand letter.

On March 8, 1984, Mesa filed a notice of appeal and statement of reasons with the Director of MMS from the MMS' January 31, 1984, demand letter. This proceeding was stayed pending a ruling on Mesa's request for refund. Mesa filed a supplemental statement of reasons on April 1, 1985.

1/ This section provides:

"(a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.

"(b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: Provided, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress."

By letter dated March 27, 1984, Mesa filed the formal request for repayment suggested by the Tulsa Regional Compliance Office. Mesa enclosed 10 MMS Forms 2014 completed to "reflect royalties billed for audit exceptions from February 1983 through August 1983 in the total amount of \$1,446,631.64" and stated: "Please consider this letter and the accompanying data as a formal Request for Repayment * *

* under the 1953 Outer Continental Shelf Lands Act, Section 10." 2/

MMS dispatched an auditor to Mesa's offices. He requested Mesa to determine whether other working interest owners had paid royalties from February - November 1982 based on the working interest shares to which they were entitled (as they were supposed to do until December 1, 1982) or based on actual sales, as they were directed to do after that date. In April 1984, Mesa sent letters to more than 30 companies that held interests in one or more of the leases involved. Many reported they had paid based on sales, although many did not respond. In May Mesa sent a follow-up letter to those who did not respond. In June 1984, Mesa informed the MMS auditor of the final results of its inquiry; more than a third of the companies still had not responded. See Exhibit G to Mesa's Supplemental Statement of Reasons.

Mesa's formal request for refund was denied by the Tulsa Regional Compliance Office by letter dated January 21, 1985. The Regional Manager stated:

Addendum No. 1 of the Payor Handbook for the Royalty Management Program stated that effective December 1, 1982, each payor not having formal written instructions from MMS stating otherwise will report sales and royalties based on actual quantities taken from a lease regardless of whether the quantities are greater than or less than entitlements based on working interest agreements. The MMS holds the position that retroactive adjustments in royalty paid as a result of changing from the entitlement method to paying for actual quantities taken for periods prior to the issuance of Addendum No. 1 is a matter to be handled among and between the various payors. The refund provision of Section 10 of the Outer Continental Shelf Act will not apply, and the MMS will not become involved until evidence is shown that total royalty paid from all payors is in excess of total royalties due the lease. Therefore, the March 27, 1984 refund request is denied. As a result, the credit adjustments taken within Mesa's monthly "Report of Sales and Royalty Remittance", Form MMS-2014 (formerly Form 9-2014) listed with the January 31, 1984 letter constitute deficiencies in royalty payments.

2/ We note that the record does not contain the original of Mesa's request for refund or accompanying forms. The copies of the forms that are in the record are for the most part illegible. See Dugan Production Corp., 103 IBLA 362 (1988).

The Regional Manager directed Mesa to tender payment in the amount of \$1,446,632.05 or renew its letter of credit before March 8, 1985.

On February 17, 1985, Mesa filed a notice of appeal from the January 21, 1985, denial of its refund request with the Director of MMS; on March 21, 1985, it filed a supplemental statement of reasons.

Appellant's Arguments

In its appeal to the Director of MMS concerning the January 31, 1984, demand letter Mesa argued that the letter failed to identify the type of adjustments made and failed to evaluate the correctness of those adjustments; that the letter erred in asserting that the adjustments could not be made on the MMS-2014 forms; that even if the adjustments could not be made on those forms, they could be made as offsets to the underpayments set forth in the letter, citing Shell Oil Co., 52 IBLA 74 (1981) and Mobil Oil Corp., 65 IBLA 295 (1982); and that if the adjustments must be made through the statutory refund procedure of 43 U.S.C. | 1339 (1982), then that procedure unconstitutionally deprives Mesa of its property without due process of law.

In its appeal to the Director of MMS concerning the January 21, 1985, denial of its refund request Mesa argued that the language of 43 U.S.C. | 1339 (1982) ("when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease * * * in excess of the amount he was lawfully required to pay" (emphasis added)) entitles an individual payor who has made a payment in excess of what was required to a refund, without providing proof to MMS that the royalties paid by other payors have resulted in the lease account being overpaid; that section 101(c) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. | 1711(c) (1982), makes clear that the Secretary is to continue his practice of treating individual payors as responsible for their share of royalties, without regard to the over- or underpayments of other payors; that MMS had abandoned proposed rules that would have established one lessee as a "single payor" responsible for the payments of all other lessees' royalties, and cannot impose the requirement by decision; that MMS' condition for a refund (that there be no underpayments by other payors) enables MMS to delay making a refund indefinitely and prevents a person from claiming a refund on time because the person claiming a refund cannot know whether there have been underpayments by other payors; that requiring a payor to submit information about other payors' payments calls for action that would subject the payor to sanctions for violation of provisions of antitrust laws; and that the MMS decision discriminates against it by relieving other lessees of their royalty obligations while denying it a refund for its overpayment.

The MMS Director's Decision

By decision dated May 29, 1986, the Director upheld both the January 31, 1984, demand letter (in the appeal docketed as MMS-85-0050-OCS) and the January 21, 1985, denial of Mesa's request for refund (MMS-85-0048-OCS). The Director's decision said the January 31, 1984, letter and schedules and the January 21, 1985, letter "adequately apprised

Mesa of the items in contention and of MMS's position." The Director held that 43 U.S.C. | 1339 (1982) is "straightforward and unequivocal" in its requirement that a written claim for a credit or refund of excess payments must be filed within 2 years after such payments were made, citing Phillips Petroleum Co., 39 IBLA 393, 397 (1979), and concluded that "as to any royalties paid prior to 1982, appellant's claim for a refund would be barred by the 2-year limitation" in that section of the law because it was not submitted until March 27, 1984. He noted that the Department's instructions in Solicitor's Opinion M-36942, "Refunds and Credits under the Outer Continental Shelf Lands Act," 88 I.D. 1090, 1099 (1981), unequivocally call for a written request for repayment to claim a refund, adding that Payor Handbook Addendum No. 4, page 3 of 5, issued July 1983, specifically provided that "[a] payor cannot recoup an overpayment on an OCS lease through entries to Form MMS-2014 without receiving prior approval from MMS." The offsets in the Shell Oil Co. and Mobil Oil Corp. cases, *supra*, were allowed more than 2 years after the payments were made only in the context of an MMS audit, not where alleged overpayments had been deducted from royalty reports filed later, as in Mesa's situation, the decision stated.

As to Mesa's arguments concerning the January 21, 1985, decision denying its request for refund, the Director's decision stated MMS' view that ownership of undivided interests in a lease does not constitute ownership of separate leases, each with its own distinct royalty obligation. The decision quoted Continental Oil Co., 74 I.D. 229, 236 (1967): "[A]ll parties holding undivided interests [in an OCS lease] are responsible for the rentals and royalties." The lease names co-lessees as "the lessee" and obligates the lessee to pay royalty from the leased area, not simply a portion of it, the Director stated, adding that 43 U.S.C. | 1334(d) (1982) authorizes cancellation of an entire lease, not just a portion of it, if part of the royalties are not paid. The decision stated:

Accordingly, in order to obtain a refund, Mesa was required to show that, as of the time of the refund request, the lease account as a whole was in an overpayment status. In the absence of such showing by Mesa, no determination could be made that a payment in excess of the amount required had been made by the co-lessees acting as the "Lessee" under a particular lease.

(Decision at 6).

Further, the Director stated, 43 U.S.C. | 1339 (1982)

gives broad latitude to the Secretary to determine (to his "satisfaction") when an overpayment has occurred. * * *

There is a strong Federal policy holding that administrative agencies have wide discretion to construe statutes they are obligated to implement * * *. It is the MMS's [sic] prerogative to interpret | 10 as conditioning refunds upon a net positive lease balance. Under the circumstances, it is proper for the MMS to require a showing that the lease account as a whole is in an overpayment status before a refund is paid to a single co-lessee.

(Decision at 7). Section 101(c) of the Federal Oil and Gas Royalty Management Act was designed to require the Department to employ the same accounting practices during an audit as were in place during the period of time covered by the audit, the Director's decision added, and did not change Mesa's obligations under the lease, i.e., that it is jointly and severally liable for the royalties due. Nor did MMS require Mesa to become a single payor, the decision stated, it only conditioned its refund on a positive lease account balance.

Concerning Mesa's argument about antitrust law violations, the decision stated:

We recognize that Mesa and its co-lessees are concerned that the sharing of all of the information needed for the filing of a fully documented refund application may have antitrust implications. However, nothing prevents them from separately filing any of the needed documentation with RMP [Royalty Management Program] under individual cover letters associating the various submissions with a particular refund request submitted by an individual co-lessee who feels that he overpaid his share of the royalties. The only information which co-lessees would need to obtain from each other in order to prepare such separate submissions would be the allocated production or entitlement volumes on which each co-lessee paid royalties to MMS. An exchange limited to such information would not run afoul of the antitrust laws. The total lease production volumes and the submitter's allocated processing or transportation expenses (where relevant) can be obtained from the lease operator without giving rise to an antitrust violation.

In ruling on a refund request, the MMS would advise the co-lessees as to the royalty payment status of the lease as a whole. Such advice would enable lessees to seek contribution from each other where appropriate.

(Decision at 9).

The Director's decision observed that all co-lessees seeking a refund would have to make the same showing as required of Mesa, so there was no discriminatory treatment, and that MMS was not authorized to rule on the constitutionality of the procedures required by 43 U.S.C. | 1339 (1982).

The Director's decision stated that the November 1982 addition to the Payor's Handbook that required royalties to be reported on the basis of actual sales rather than ownership interests or entitlements did so prospectively, i.e., after the effective date of December 1, 1982, so that to the extent Mesa's claim was an attempt to obtain a refund for royalties paid on the basis of entitlements that exceeded sales volumes before December 1, 1982, it was unfounded. The Director characterized "the bulk of Mesa's claim" as such an attempt.

The Director's decision concluded by stating:

During the production period involved, the Payor Handbook also provided that RMP would "not recognize 'Balancing Agreements' (also known as over/under accounting) in relation to reporting a month's sales data." * * * Thus, problems arising under balancing agreements are more properly resolved by the co-lessees among themselves. If Mesa feels that it has discharged part of its co-lessees' royalty obligations under a balancing agreement, Mesa has a right of contribution against the underpaying co-lessees. Victoria Copper Mining Co. v. Rich, 193 F. 314 (5th Cir. 1911), and cases cited at 48 A.L.R. 586-603.

(Decision at 11).

Discussion

[1] As to royalty payments made by Mesa before March 27, 1982, i.e., 2 years before the date it filed its request for refund, the Director's decision must be affirmed. We have consistently held that 43 U.S.C. § 1339 (1982) requires that a person must file a request for a refund, rather than deduct or credit the amounts it believes it overpaid on later monthly royalty reports, and that such a request must be filed within 2 years of the date the payment was made. Santa Fe Energy Co., 107 IBLA 32 (1989); Kerr-McGee Corp., 103 IBLA 338 (1988); Shell Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987).

[2] The remaining question is whether MMS properly imposed on Mesa the burden of demonstrating that all the accounts for the leases in which Mesa owned a working interest were in an overpaid status as a prerequisite to considering its refund request. Normally when a lease has more than one working interest an operator is designated to make the royalty payments to MMS. In that situation MMS could reasonably expect a working interest that applied for a refund to supply information about the royalty payments for the lease as a whole via that operator. This case presents unusual circumstances, however: There are fifteen leases with multiple working interests that pay royalty on their own behalf rather than through one or more operators. Although we have considered the parties' legal arguments carefully, under these circumstances we think the question is essentially practical rather than legal and that the answer depends on who is most capable of gaining access to the information necessary for determining what the status of the accounts is.

Each company must file a Form MMS-2014 each month. On this form the company must provide the month and year of the report; its name; its "payor code" number assigned by MMS; an "accounting identification" number assigned by MMS (also called an AID number) that includes the number of the lease; data about the product, the selling arrangement and kind of transaction, and the amount and value of the product sold; and, finally, the amount and value for royalty purposes, i.e., the product of the amount and value of the product sold times the royalty rate.

MMS employs the information it receives on these forms in an automated fiscal accounting system, called the Auditing and Financial System (AFS). MMS describes this system as follows:

In addition to accounting for royalties reported by payors, the AFS, using Form MMS-2014 information, performs numerous other functions. These functions include monthly distribution of mineral revenues to State, Indian, and General Treasury accounts, providing royalty accounting and statistical information to States, Indians, and others who have a need for such information, and identifying underreporting and nonreporting so MMS can promptly collect revenues. [3/]

It is thus clear that MMS receives information monthly from each person holding a working interest in a lease, identified with the lease number, and that it has the information management capability to learn whether the royalty due for any given lease is underpaid or overpaid in any given month.

We recognize the complication in this case, namely, that the royalty basis changed from entitlements to sales effective December 1, 1982, (i.e., during the time since March 27, 1982, that Mesa could claim a refund), with the result that for April - November 1982 the royalty accounts for the leases involved will have to be examined to determine the basis each payor used in calculating its royalty payments. And we have not overlooked MMS' complaint that it does not have the information about the status of the lease accounts readily available and that it would be administratively burdensome for it to review the monthly reports for this period, in some instances manually. However, the difficulty Mesa experienced in its attempt to obtain limited information concerning royalty payment bases from other interest holders, as well as the acknowledged legal risks that would be encountered by a payor seeking information to support a refund request 4/ make it clear to us that it is more appropriate to have the agency that has that information and the resources to marshal it do so, rather than imposing the burden on the person who applies for a refund. We therefore hold that, under the circumstances presented here, it was improper for MMS to deny Mesa's refund request because Mesa did not include a showing that the lease accounts as a whole were in an overpayment status.

Mesa states that

most of these adjustments [that it entered on its February - August 1983 Form MMS-2014's] were made in order to correct a variety of routine accounting discrepancies such as metering adjustments, clerical errors, revised operator allocation statements, retroactive adjustments to transportation allowances

3/ Oil and Gas Payor Handbook, Volume 2, Report of Sales and Royalty Remittance (Form MMS-2014), Release 01, September 1986, at 2-1.

4/ We do not find the suggestion for avoiding these risks offered in the Director's decision a satisfactory alternative.

ordered by MMS, and revised pipeline nominations. One adjustment was made in order to conform Mesa's reports to changes in the MMS Payor Handbook requiring the calculation of natural gas royalties on the basis of sales rather than entitlements.

(Supplemental Statement of Reasons at 3). MMS' Answer states that nothing in Mesa's refund request or accompanying data indicates why an overpayment had occurred or whether it was unique to Mesa and that "even at this late date [September 1986], Mesa still refuses to indicate which adjustments are for what reasons" (Answer at 3, 5).

However, at the time Mesa filed its request, no rules specified the contents of a refund request, nor do any yet. See Shell Offshore, Inc., 96 IBLA 149, 171-74, 94 I.D. 69, 82-84 (1987); Chevron U.S.A. Inc., 105 IBLA 21, 25-27 (1988). Since that time we have held that "future requests after the date this opinion issues should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought." Shell Offshore, Inc., 96 IBLA at 174, 94 I.D. at 84; see also Chevron U.S.A. Inc., *supra* at 25-27. In view of our conclusion that MMS improperly denied Mesa's refund request because Mesa failed to include a showing that the lease accounts were in an overpayment status, it is now appropriate for Mesa to submit a written request for refunds of excess payments it made after March 27, 1982, that specifies the reasons the refunds are sought and for MMS to consider that request.

[3] As noted above, the Director's decision stated that during the production period involved, the Payor Handbook provided that the Royalty Management Program would not recognize balancing agreements or "over/under accounting" in relation to reports of a month's sales data. We observe that such a provision in the Payor Handbook does not have the force and effect of law. Dugan Production Corp., 107 IBLA 91, 94 (1989); Chevron U.S.A. Inc., *supra* at 26, n.5.

In view of our decision, Mesa's request for a hearing is denied.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the MMS Director's decision of May 29, 1986, is affirmed in part and reversed in part, and the case is remanded for action consistent with this opinion.

Will A. Irwin
Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member